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Attorney for Defendant,

THE HERTZ CORPORATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KATHRYN A. NIEMEYER,)
 Individually and as the)
 Representative of the Estate)
 Of ANTHONY NIEMEYER, MARK)
 NIEMEYER, JESSICA NIEMEYER,)
 and REBECCA NIEMEYER)

Plaintiff,)

vs.)

FORD MOTOR COMPANY, a Delaware)
 THE HERTZ CORPORATION; a)
 Delaware corporation; HERTZ)
 RENT-A-CAR, a corporation,)
 AUTOLIV ASP, INC., a Missouri)
 Corporation; MORTON)
 INTERNATIONAL, INC., DOES I)
 through XX; ROES I through XX;)
 MOES I through XX; and POES I)
 Through XX, inclusive,)

Defendants.)

CASE NO.: 2:09-cv-2091-JCM-PAL

DEFENDANT, THE HERTZ CORPORATION'S, MOTION TO DISMISS

Defendant, *THE HERTZ CORPORATION*, by and through its attorney of record, Phillip R. Emerson, Esq., of the Law Offices of Emerson and Manke, PLLC, hereby submits the following MOTION to Dismiss. This Motion is based upon the following memorandum of points and authorities, any and all papers and pleadings on

1 file herein, plus any oral argument of counsel entertained by the
2 Court at the hearing of this matter.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **FACTUAL/PROCEDURAL BACKGROUND**

6 This is an action for the wrongful death of Anthony Niemeyer
7 arising from a motor vehicle accident which occurred on September
8 18, 2007. On that date, Anthony Niemeyer was operating a Ford
9 Focus rented from *THE HERTZ CORPORATION* northbound on Village
10 Center Drive in the number one travel lane. According to
11 witnesses, Mr. Niemeyer appeared to have an attack of some kind
12 and suddenly veered to the left, driving over the median, through
13 the southbound travel lanes, and into a tree on the west curb.
14 Following the impact, a witness found Mr. Niemeyer slumped over
15 the steering wheel.
16

17 Mr. Niemeyer's family members filed an Amended Complaint for
18 Damages on September 17, 2009 in the Eighth Judicial District
19 Court for Clark County, NV. On October 14, 2009, *THE HERTZ*
20 *CORPORATION* filed an Answer to Plaintiffs' Amended Complaint for
21 Damages. On October 29, 2009, Defendant, FORD MOTOR COMPANY,
22 removed the matter to United States District Court based on
23 diversity jurisdiction.
24

25 Plaintiffs allege Defendant FORD MOTOR COMPANY
26 "manufactured, assembled, designed and/or produced a defective
27 and dangerous vehicle and/or airbags resulting in the death of
28

1 ANTHONY NIEMEYER..." (See Attached Exhibit A, Plaintiffs' Amended
 2 Complaint for Damages)

3 With respect to *THE HERTZ CORPORATION*, Plaintiffs allege:

4 That Defendants THE HERTZ CORPORATION and
 5 HERTZ RENT-A-CAR, together with the other
 6 Defendants herein should be held responsible
 7 for the death of ANTHONY NIEMEYER because
 8 they rented and supplied a defective vehicle
 9 with defective airbags to ANTHONY NIEMEYER
 10 resulting in his death. That these
 11 Defendants were negligent and strictly
 12 responsible for the condition of said car.
 13 (See Ex. A, p. 5/lines 9-14)

14 Plaintiffs are suing *THE HERTZ CORPORATION* under the
 15 theories of negligence and strict liability. In Nevada, short
 16 term lessors are not liable under the theories of strict products
 17 liability or the crashworthiness doctrine. As such, Plaintiffs'
 18 Complaint should be dismissed with respect to *THE HERTZ*
 19 *CORPORATION* pursuant to FRCP 12(b)(6) for failure to state a
 20 claim upon which relief can be granted.

21 II.

22 LEGAL ARGUMENT

23 A. Standard for Dismissal.

24 Dismissal in accordance with FRCP 12(b)(6) is only
 25 appropriate when "...it appears beyond doubt that the plaintiff can
 26 prove no set of facts in support of his claim which would entitle
 27 him to relief." *McCray v. Veneman*, 298 F.Supp.2d 13, 14 (D.C.
 28 Dist. Col. 2002) *citing to Conley v. Gibson*, 355 U.S. 41, 45-46,
 78 S. Ct. 99 (1957). In evaluating a motion to dismiss for

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1 failure to state a claim upon which relief can be granted, the
 2 court will construe the allegations in the complaint liberally in
 3 the plaintiff's favor. See *Schuler v. United States*, 199 U.S.
 4 App. D.C. 23, 617 F.2d 605 (D.C. Cir. 1979)

5 "When a federal court exercises diversity jurisdiction, it
 6 merely serves as a neutral forum in which to present state law
 7 claims." *Goetzke v. Ferro Corp.*, 280 F.3d 766, 779 (7th Cir.
 8 2002) "If state substantive law has denied plaintiff a remedy
 9 for his cause of action, the district court must dismiss the
 10 complaint for failure to state a claim upon which relief can be
 11 granted." *Id.*

12 Even assuming all factual allegations of Plaintiffs' Amended
 13 Complaint are accurate, Plaintiffs have failed to plead a cause
 14 of action against *THE HERTZ CORPORATION* upon which relief can be
 15 granted. As such, Defendant respectfully requests this Honorable
 16 Court dismiss Plaintiffs' Amended Complaint against *THE HERTZ*
 17 *CORPORATION*.
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20 **B. The Supreme Court of Nevada has not applied the**
 21 **crashworthiness doctrine or the doctrine of strict**
 22 **products liability to short term lessors.**

23 The crashworthiness and strict products liability doctrines
 24 do not apply to short terms lessors in Nevada. As such,
 25 Plaintiffs' allegations against *THE HERTZ CORPORATION* should
 26 properly be dismissed.
 27
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1 **i. Crashworthiness Doctrine.**

2 The crashworthiness, "enhanced injury," or "second
3 collision" doctrine is defined as:

4 The second collision doctrine, enhanced
5 injury doctrine, or defect-enhancing
6 doctrine, as it is variously called, is
7 the legal concept which imposes
8 liability based on the construction or
9 design of a product which causes
10 enhanced or greater injuries in the
11 course of or following an initial
12 accident or collision brought about by
13 some independent cause. *Bass v. GMC*,
14 150 F.3d 842, 846 (8th Cir. 1998) *citing*
15 *to Polk v. Ford Motor Co.*, 529 F.2d
16 259, 265 (8th Cir. 1976) (en banc)

17 A typical strict products liability case involves an alleged
18 defect causing an injury. A crashworthiness or enhanced injury
19 case involves a situation where the alleged defect is not the
20 cause of the accident but enhances the injuries sustained. See
21 *Weir v. Crown Equip. Corp.*, 217 F.3d 453, 460-461 (7th Cir. 2000)

22 A vehicle manufacturer "...has a duty to design a reasonably
23 crashworthy vehicle." *Andrews v. Harley Davidson*, 106 Nev. 533,
24 537, 796 P.2d 1092, 1095 (1990) The *Andrews* matter is the
25 totality of the Supreme Court of Nevada's jurisprudence regarding
26 crashworthiness. The Court continued:

27 A major policy behind holding manufacturers
28 strictly liable for failing to produce
crashworthy vehicles is to encourage them to
do all they reasonably can to design a
vehicle which will protect a driver in an
accident. *Id.*

1 The Supreme Court of Nevada has not applied this holding to
2 lessors of vehicles such as *THE HERTZ CORPORATION*.

3 **ii. Strict Products Liability.**

4 In addition, the Court has not applied the doctrine of
5 strict products liability to lessors. When given the opportunity
6 to do so, the Court declined.¹

7
8 The Court not only has failed to apply strict products
9 liability to lessors, **it has also expressly limited the**
10 **application of liability to sellers, dealers and manufacturers.**
11 In *Calloway v. City of Reno*, 116 Nev. 250, 992 P.2d 1259 (2000)
12 (superseded by statute on other grounds, *Olson v. Richard*, 120
13 Nev. 240, 243, 89 P.3d 31, 33 (2004)), the Court stated:

14
15 The contractor who installed the gas line
16 fitting in Worrell should not have been
17 subject to the doctrine of strict products
18 liability. As set forth above, **one is**
19 **strictly liable for damages from a**
20 **dangerously defective product only if one is**
21 **a seller "engaged in the business of selling**
22 **such a product."** *Id.* at 270, *citing*
23 Restatement (Second) of Torts § 402A (1965)
24 (emphasis added)

25 Regarding warning labels, the Supreme Court of Nevada
26 stated: "Where the defendant has reason to anticipate that
27 danger may result from a particular use of his product, and he
28 fails to warn adequately of such a danger, the product **sold**
without a warning is in a defective condition." *Oak Grove*

27 ¹ In *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 953 P.2d 24 (1998), respondents
28 argued during oral argument that "...strict liability does not and should not
apply to lessors of personalty." *Id.* at 6, n. 1. As the issue was not briefed
by the parties, the Court declined to address it.

1 *Investors v. Bell & Gossett Co.*, 99 Nev. 616, 624, 668 P.2d 1075,
2 1080 (1998) (emphasis added) In this matter, there is no
3 allegation that *THE HERTZ CORPORATION* sold the 2007 Ford Focus at
4 issue.

5 The Third Circuit Court of Appeals held that the
6 crashworthiness doctrine could be applied to a lessor because
7 strict products liability is "extended to all suppliers of a
8 produce that is 'consumed' by the public." *Habecker v. Clark*
9 *Equip.*, 376 F.3d 278, 288-289 (3rd Cir. 1994) However, the state
10 of Nevada does not apply strict products liability as liberally
11 as the state of Pennsylvania. The Supreme Court of Nevada
12 previously held a health department that distributes public
13 vaccinations could not be held liable under either warranty or
14 strict liability theories because it "is not a seller of
15 products." *Allison v. Merck & Co.*, 110 Nev. 762, 766, 878 P.2d
16 948, 951, n. 1 (1994) Thus, even though the Clark County Health
17 District distributed the allegedly defective vaccines to the
18 public, as it was not a seller, it could not be held liable.

19 There is no binding authority for the application of either
20 the strict products liability or crashworthiness doctrines to
21 lessors of vehicles such as *THE HERTZ CORPORATION*. The Supreme
22 Court of Nevada has limited strict products liability to sellers
23 and manufacturers. As such, even assuming all allegations in
24 their Amended Complaint are accurate, Plaintiffs have failed to
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1 state a claim upon which relief can be granted against *THE HERTZ*
2 *CORPORATION*.

3 **C. Application of the crashworthiness doctrine to *THE HERTZ***
4 ***CORPORATION* is contrary to Nevada policy.**

5 Were this Court to apply the crashworthiness doctrine to *THE*
6 *HERTZ CORPORATION*, it would be contrary to the Supreme Court of
7 Nevada's stated purpose for its application. The Court held in
8 *Andrews* the purpose of the doctrine was to encourage manufactures
9 of vehicles to do all they can to design safe vehicles that will
10 protect occupants during an accident. *Id.* *THE HERTZ CORPORATION*
11 was not involved in the manufacture of this vehicle. Thus,
12 applying the doctrine to *THE HERTZ CORPORATION* does not promote
13 the Court's stated public policy reasons.
14

15 It is anticipated Plaintiffs will cite *Maduikie v. Agency*
16 *Rent-A-Car*, 114 Nev. 1, 953 P.2d 24 (1998) That case is
17 distinguishable from the matter at bar. In *Maduikie*, appellants
18 rented a vehicle in Reno and drove to Las Vegas for a family
19 vacation. *Id.* at 3. Early in their drive back home to Reno, the
20 brakes failed. *Id.* The rental agency office in Reno instructed
21 appellants to return the vehicle to the office in Las Vegas. *Id.*
22 Inexplicably, the office in Las Vegas refused to repair or
23 replace the vehicle, forcing appellants to drive the vehicle home
24 to Reno the following morning. *Id.* During the drive they were
25 involved in an accident.
26
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1 There is no allegation that *THE HERTZ CORPORATION* acted in a
2 manner consistent with the agency in *Maduiké*. As such, that
3 matter is distinguishable.

4 Applying the crashworthiness doctrine or strict products
5 liability to a short term lessor of a vehicle does nothing to
6 encourage manufacturers to make safe vehicles. *THE HERTZ*
7 *CORPORATION* is in no position to remedy the alleged airbag
8 defects at issue in this case. In addition, keeping *THE HERTZ*
9 *CORPORATION* in this litigation will only serve to drive up
10 litigation costs and consume judicial resources. In the event
11 Plaintiffs prevail at trial, *THE HERTZ CORPORATION* would then be
12 compelled to file additional indemnification and contribution
13 litigation against FORD MOTOR COMPANY. This is further reason
14 why public policy is best served by dismissal of *THE HERTZ*
15 *CORPORATION* from the instant matter.

16
17
18 **D. Application of either doctrine is a legislative issue, not
19 a judicial one.**

20 Finally, if the choice is made to apply either strict
21 products liability or the crashworthiness doctrine to short term
22 lessors of vehicles, the legislature should make the choice, not
23 the judiciary. Applying new liability to the rental car industry
24 in a state such as Nevada that relies heavily on tourism will
25 require analysis of a number of economic, social and fiscal
26 factors not at issue in this matter. Thus, if what's best for
27 Nevada is application of these theories of liability to short
28

1 term lessors of vehicles, the legislature should make the choice
 2 after appropriate argument and procedure. Some states have
 3 chosen to do so.² However, given the myriad of extrinsic issues
 4 unrelated to the subject litigation, Defendant argues applying a
 5 new cause of action to the rental car industry is the duty of the
 6 legislature, not the judiciary.
 7

8 III.

9 CONCLUSION

10 For the reasons stated above, Defendant, *THE HERTZ*
 11 *CORPORATION*, respectfully requests this Court dismiss all causes
 12 of action Plaintiffs allege against *THE HERTZ CORPORATION* for
 13 failure to state a claim upon which relief can be granted.
 14

15 DATED this 18th day of April, 2011.

16 *EMERSON & MANKE, PLLC*

17 /s/ Phillip R. Emerson, Esq.

18 PHILLIP R. EMERSON, ESQ.

19 Nevada Bar No. 5940

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THE HERTZ CORPORATION

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 27 ² Indiana's Strict Product Liability Act imposes liability on "one who sells,
 28 leases, or otherwise puts into the stream of commerce any product in a
 defective condition unreasonably dangerous..." See *Rogers v. Ford Motor Co.*, 925
 F. Supp 1413, 1420 (N.D. Indiana 1996)

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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that service of the foregoing, **DEFENDANT, THE HERTZ CORPORATION'S, MOTION TO DISMISS**, was made this 23rd day of May, 2011 by depositing a true and correct copy of the same for mailing, addressed as follows:

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/s/ Krystina June

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